No. 97-0953

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, California State Prison at San Quentin, Petitioner

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent

RODNEY G. BEELER, Real Party in Interest

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REAL PARTY IN INTEREST'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In this case, the Ninth Circuit Court of Appeals -- in a decision written by Judge Alex Kozinski and joined by Judges Stephen S. Trott and David R. Thompson -- held that the one-year period of limitation in newly enacted 28 U.S.C. § 2244(d) is subject to equitable tolling. Calderon v. U.S. District Court, 128 F.3d 1283, 1997 WL 709900 (9th Cir. 1997), mandamus denied sub nom. In re Arthur Calderon, 138 L.Ed.2d 1004.[1] There is nothing worthy of certiorari about this holding. Not only did the Court of Appeals construe section 2244(d) as embodying the same equitable principle that statutes of limitation have "customarily" and "presumptively" been construed to embody,[2] but the Court's conclusion was supported by "[e]very relevant signal -- from the Act's plain language, to its legislative history, to its structure." 1997 WL 109900 *5, App.3 at A132.

Nevertheless, petitioner Calderon insists that section 2244(d)'s one-year period of limitation be given an illogical and extremist reading, one that is certain to produce injustices of the gravest sort. For, under Calderon's "absolute"

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[1] When referring hereafter to the Ninth Circuit's amended opinion below, this brief will use the WestLaw citation and the page citation within Appendix 3 of petitioner Calderon's certiorari petition. Although the opinion below will be reported at 128 F.3d 1283, the volume of the Federal Reporter containing the opinion has not yet been issued, and thus no official page citations to internal pages of the opinion are currently available.

[2] See, e.g., cases collected post, n.5 and accompanying text.

interpretation (Pet. 9 & 13), the one-year period would be immutably fixed for all cases and for all purposes, no matter how compelling the reason justifying a longer time. If counsel cannot be found for a capital prisoner within one year, or if counsel is appointed with insufficient time to meaningfully prepare, or if counsel dies or becomes sick or quits or is disbarred, or if counsel's office is destroyed in an earthquake or a fire, it is the prisoner who suffers; he will have no federal habeas corpus review and can be executed forthwith, regardless of the unconstitutionality of the judgment against him.

Similarly, since the one-year period of limitation applies to non-capital as well as capital prisoners, an uncounseled non-capital prisoner could, under petitioner Calderon's interpretation, be denied habeas review simply because he or she failed to tender a timely in forma pauperis motion with the habeas petition, or because the petition contained some other easily remediable technical deficiency or was late because it had been tossed into the trash by a rogue prison official.

In petitioner Calderon's view, the consequences of any and all such acts of God, third-party malfeasances, and technical shortcomings are to be visited upon the prisoner, regardless of the prisoner's lack of fault or inability to prevent them.

Suffice it to say, nothing in the language or legislative history of section 2244(d) supports Calderon's argument. To the contrary, as Judge Kozinski pointed out, "[e]very relevant signal" points the other way, i.e., to the conclusion that the

one-year timing provision is "a statute of limitations subject to equitable tolling, not a jurisdictional bar." 1997 WL 70900 *5, App.3 at A132.

Thus, the present petition for writ of certiorari has utterly no merit. The challenged holding of the Court of Appeals, like that of the District Court before it, was "clearly correct"[3] and presents no question meriting this Court's intervention. See Section II, post. Certiorari is also inapprcpriate for two additional reasons.

First, the certiorari petition should be denied as an abusive, successive filing. Petitioner Calderon has previously sought to persuade this Court to review the exact same issue in the exact same case; having had one such full opportunity, petitioner should not be given another.

Second, this case is inappropriate for certiorari review because, prior to the date on which (in petitioner Calderon's view) section 2244(d)'s one-year limitation period expired, real party in interest Beeler was specifically authorized by both the District Court and the Court of Appeals to file his habeas petition at a later date, and this Court declined to review those decisions both before and after the alleged statutory deadline. Real party justifiably relied upon those court rulings in filing his petition on October 10, 1997.

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[3] 1997 WL 709900 *4, App.3 at A129.

I. CASE BACKGROUND

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter, the "AEDPA" or the "Act"). The Act made essentially two sets of changes to federal habeas corpus proceedings. First, it amended several provisions of the pre-existing habeas corpus statutes, i.e., those in Chapter 153 of Title 28 of the United States Code. Second, it added an entirely new chapter to Title 28 -- Chapter 154 -- containing new provisions that apply only to capital habeas cases arising out of states that opted to satisfy certain pre-conditions. The limitations statute at issue in the present case -- 28 U.S.C. § 2244(d) -- was one of the AEDPA's revisions to Chapter 153; petitioner Calderon has conceded the "Chapter 154" or "opt-in" revisions do not apply to Mr. Beeler's case. (Pet 6 n.2.)

The Court of Appeals has accurately characterized the relevant factual background of the case. 1997 WL 709900 *1 & *6, App.3 at A122-A123, A132. However, in light of omissions and mischaracterizations in the certiorari petition, real party needs to clarify several matters at the outset.

First: the attorney who withdrew as counsel for Mr. Beeler in the District Court was not merely "one of [Beeler's] originally appointed counsel," as petitioner Calderon asserts (Pet. 5, 12), but was Beeler's primary counsel and had performed about 80 percent of the work on the case. The other attorney (Ms. Schryver) was already lead counsel in two other federal capital cases in which habeas petitions had not yet been filed,

and she was also responsible for assisting lawyers in numerous other state and federal capital cases; thus, her role in Mr. Beeler's case was limited to serving as "back up" for lead counsel. See Schryver Decl. (Pet. Supp. Ex. submitted to 9th Cir. 3/27/97) at 1-2, ¶ 2.

Second: upon learning of primary counsel's decision to leave, Ms. Schryver began an immediate search to find another lawyer to serve as second counsel, while she herself -- although "already bogged down in a number of other capital cases" (1997 WL 709900 at *1, App.3 at A122) -- was assigned by her office to take over former counsel's role as Mr. Beeler's primary attorney. It was only later, after finding that "much of the work product [that former lead counsel] left behind was not usable" (1997 WL 709900 at *6, App.3 at A132), that counsel for real party requested the extension of time and equitable tolling.

Third: Contrary to petitioner Calderon's representation, there was nothing "bare bones" about the petition that Mr. Beeler was ordered to and did file in this case. See Pet. 12. It is true that the District Court did not order Beeler to file a memorandum of points and authorities with the petition, but such a memorandum is not called for by the Habeas Rules or by the Local Rules, and the "fact pleading" petition that Mr. Beeler did file in accordance with federal law was 97 pages long.[4]

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[4] One additional factual mischaracterization from the certiorari petition is appropriately mentioned here. When the District Court granted Mr. Beeler until October 13, 1997 to file his habeas petition, it effectively granted equitable tolling for five and one-half months past the one-year statute of limitations (continued...)

II. THE COURT OF APPEALS WAS CLEARLY CORRECT IN CONCLUDING THAT A DISTRICT COURT MAY EQUITABLY TOLL THE ONE-YEAR PERIOD OF LIMITATION SET FORTH IN 28 U.S.C. § 2244(d).

The Court of Appeals' conclusion that section 2244(d)'s one-year filing period may be equitably tolled was plainly correct. The language of new section 2244(d) itself, the governing case law, and the historical context all make this crystal clear, and the Court of Appeal's analysis of these matters was so obviously right that petitioner Calderon does not even address it. Indeed, if anything, the Court of Appeals understated both the case in favor of its holding and the problems with Calderon's arguments.

A. Petitioner Calderon Does Not Contest Most Of The Court Of Appeals' Analysis.

Neither in the current petition nor in the petition for writ of mandate that petitioner Calderon submitted to this Court in this same case in April 1997 has petitioner addressed, let alone rebutted, the bulk of the Court of Appeals' reasoning. Among the uncontested points are the following:

1. "Statutes of limitations are presumptively subject to equitable tolling." 1997 WL 709900 at *5, App.3 at A131, citing Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96

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[4](...continued)
date (April 23, 1997), not for seven months, as petitioner Calderon indicates. Pet. 12:8-9.

Additional mischaracterizations of fact and law are set forth in the remainder of this Opposition, especially in Section III.C.

(1990), and United States v. Locke, 471 U.S. 84, 94 n.10 (1985).[5]

2. Newly enacted section 2244(d) "reads like an everyday, run-of-the-mill statute of limitations." 1997 WL 709900 at *6 n.4, App.3 at A129 n.4.

3. Newly enacted section 2244(d) "is phrased only as a 'period of limitation,' and 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.' Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982). Nor does the jurisdictional provision of the habeas statute, 28 U.S.C. § 2241, 'limit jurisdiction to those cases in which there has been a timely filing' in the district court. Zipes, 455 U.S. at 393." 1997 WL 709900 at *4, App.3 at A129.[6]

4. "[B]oth the Supreme Court and this court have repeatedly held that timing provisions even more unyieldingly phrased than AEDPA's are statutes of limitations subject to tolling. See,

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[5] United States v. Locke, 471 U.S. 84, 94 n. 10 (1985) ("Statutory filing deadlines are generally subject to defenses of waiver, estoppel and equitable tolling."); Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990) ("Time requirements in law suits ... are customarily subject to equitable tolling.") (internal quotation omitted). Among the additional cases the Court of Appeals could have cited are Lampf v. Gilbertson, 501 U.S. 350, 363 (1991) (same); Bowen v. City of New York, 476 U.S. 467, 479 (1986) (finding "'a traditional equitable tolling principle'" in statutes of limitation) (quoting Honda v. Clark, 386 U.S. 484, 501 (1967)); Braun v. Sauerwien, 10 Wall. 218, 223 (1870) ("It seems, therefore, to be established, that the running of a statute of limitation may be suspended by causes not mentioned in the statute itself").

[6] Real party notes that these considerations are the bases upon which this Court found that equitable tolling was authorized by statute in Zipes, one of the decisions cited by the Court of Appeals that petitioner Calderon has chosen to ignore.

e.g., Burnett v. New York Cent. R.R., 380 U.S. 424, 426, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965) ("[N]o action shall be maintained ... unless commenced within three years from the day the cause of action accrued"); William G. Tadlock Const. v. United States Dept. of Defense, 91 F.3d 1335, 1340 (9th Cir. 1996) ('[C]omplaint may not be filed more than 180 days after the later of the date on which the violation is alleged to have occurred or was discovered.')" 1997 WL 709900 at *4, App.3 at A129.[7]

5. "AEDPA's legislative history, were it necessary to consult it, speaks with equally resounding clarity. Neither the conference report, see H.R. Conf. Rep. 104-518, at 111 (1996), reprinted in 1996 U.S.C.C.A.N. 944, nor any statements of individual House or Senate members, describe the one-year limitation as a restriction on federal court jurisdiction. Many members of Congress -- including AEDPA's authors in the Senate and its sponsors in the House -- did, however, describe section 101 as a 'statute of limitations.'" 1997 WL 709900 at *4, App.3 at A130.[8]

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[7] The Court of Appeals could also have pointed to such additional decisions as American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) ("Any action to enforce any cause of action [under the antitrust laws] shall be commenced within four years after the cause of action accrued") and Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 95 (1990) ("Every claim ... shall be barred unless the petition ... is filed ... within six years") (dictum).

[8] Real party would add that in Zipes, this Court found that legislative authorization for equitable tolling was supported by the fact that one Senator had characterized the statutory limitation period at issue in that case as a "period of

(continued...)

Not only has petitioner Calderon not addressed the matters just listed, but none of the cases cited above is mentioned in the certiorari petition. Not a single one.

B. Petitioner Calderon's Interpretation of Newly Enacted Section 2244(d) Would Render The AEDPA Internally Inconsistent.

Petitioner Calderon's assertion that section 2244(d) embodies an "inflexible limitation on federal court jurisdiction" (1997 WL 709900 at *1, App.3 at A122) is even more implausible than the Court of Appeals' opinion indicates, because such an interpretation would render habeas law -- and Congress' actions in enacting the AEDPA -- internally inconsistent.

In enacting the AEDPA, Congress reaffirmed a capital habeas petitioner's federal right to counsel. Legislators debating the habeas amendments deemed the right to counsel established in 21 U.S.C. § 848(q)(4)(B) to be an integral part of the system of federal habeas review, and the right was reaffirmed in the Act itself.[9] These events are especially significant in light of the background against which they arose.

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[8](...continued)
limitation" and another Senator had described the purpose of the provision as preventing the pressing of "stale" claims. Zipes, 455 U.S. at 394, citing 110 Cong. Rec. 12723 & 7243 (1964). In the present case, as the Court of Appeals made clear, the Congressional Record concerning section 2244(d) contains the same kinds of characterizations, except that here they are more numerous. Moreover, the fact that section 2244(d) used the "period of limitation" phrase that Zipes had indicated supported a finding of equitable tolling is yet further evidence that that statute embodied that doctrine.

[9] See, e.g., 141 Cong. Rec. S7813 (remarks of Sen. Hatch), S7814 (Sen. Specter) (June 7, 1995). See also AEDPA § 104(h), enacting 28 U.S.C. 6 2254(h), which is discussed below.

Not long before the AEDPA was passed, this Court had ruled that "Congress' provision of a right to counsel under § 848(q)(4)(B) reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of 'the seriousness of the possible penalty and the unique and complex nature of the litigation'" and that this right to counsel "necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." McFarland v. Scott, 512 U.S. 849, 114 S. Ct. 2568, 2572, 129 L.Ed.2d 666 (1994) (quoting 21 U.S.C. § 848(q)(7)); id. 114 S.Ct. at 2573; emphases added. Given this backdrop, it is particularly significant that, during the process of enacting the AEDPA, Congress specifically rejected a proposed amendment to section 848(q) that would have eliminated the right to counsel in capital cases and would instead have made appointment of counsel entirely discretionary. See 141 Cong. Rec. S7812-17 (June 7, 1995). Indeed, Congress went further and expressly reaffirmed the statutory provisions that had been recently interpreted in McFarland.[10]

Congress' actions with respect to a capital habeas petitioner's right to counsel not only shows its continuing

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[10] See AEDPA § 104(d), enacting 28 U.S.C. § 2254(h) (the right to counsel in federal habeas cases is discretionary "[e]xcept as provided in section 408 of the Controlled Substances Act [21 U.S.C. § 848(q)]").

"Technical amendments" were made to section 848(q) by sections 108 and 901 of the 1996 Act, but these amendments did not alter a capital petitioner's right to counsel in federal habeas proceedings.

intent to provide capital habeas petitioners with counsel -- indeed, with counsel who are (in the words of McFarland) able "meaningfully to research and present a defendant's habeas claims" -- but it also undermines petitioner Calderon's claim that section 2244(d) is an absolute and inflexible jurisdictional prerequisite to filing. For, under Calderon's view, section 2244(d) would effectively do away with the right to counsel if no attorney can be found within a year's time, or if counsel is found at a time where there is insufficient opportunity "meaningfully to research and present a defendant's habeas claims." Such a repeal by implication would be extremely doubtful in any case, but here -- where Congress specifically rejected an attempt to water down the right to counsel in capital cases, where its members extolled the importance of the assistance of counsel and insisted they were preserving the basic role of habeas corpus as a forum for protection of fundamental rights,[11] and where Congress explicitly left intact a statute interpreted by this Court to require the "meaningful" assistance of counsel -- such a repeal is inconceivable.

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[11] Throughout the debate over the 1996 Act, members of Congress emphasized that the habeas amendments were intended to preserve fairness to the habeas petitioner and the integrity of federal court review of state convictions. See, e.g., 141 Cong. Rec. S7814 & S7834 (1995) (Sen. Specter), id. at S7835 (Sen. Biden), id., at S7813 (Sen. Hatch).

III. PETITIONER CALDERON'S CURRENT ARGUMENTS ARE MERITLESS, IRRELEVANT, AND INACCURATE.

Instead of addressing the reasoning of the Court of Appeals or any of the relevant case law or other points discussed above, petitioner Calderon presents this Court with a mishmash of new and recycled arguments. Calderon's primary argument is a rather obvious effort to convince the Court of the supposed need to (in effect) enact the policies Calderon wishes Congress had imposed in section 2244(d). (Pet. 7-14.) Calderon also offers a few statutory interpretation arguments. (Pet. 14-19.) Because only the latter arguments are actually relevant to the issue before the Court, real party will address them first. (Post, Sections III.A & III.B.) Thereafter, real party will discuss petitioner's alleged policy arguments. (Post, Section III.C.)

A. Petitioner Calderon Erroneously Claims That The Language Of Section 2244(d) Reveals Congress' Intent That The One-Year Period Be "Jurisdictional In Nature."

Petitioner Calderon's first statutory argument is that the language of section 2244(d) is "precise" and "detail[ed]" and that therefore the statute must be jurisdictional and not subject to equitable tolling. (Pet. 14-15.) However, "precise and detailed" would describe most statutes of limitations, and Calderon does not even try to contest the Court of Appeals' conclusion that section 2244(d) "reads like an everyday, run-of-the-mill statute of limitations." 1997 WL 709900 at *6 n.4, App.3 at A129 n.4. Calderon's silence is particularly significant because, of course, "everyday, run-of-the-mill

statutes of limitations" customarily and presumptively embody equitable tolling. See ante at n.5 & accompanying text.[12]

Nor, contrary to petitioner Calderon's assertion, does the supposed fact that section 2244(d) "provid[es] only one specified way of extending the one-year filing period" (Pet. 14) show that the statute is jurisdictional. The courts have repeatedly refused to infer that a statutory listing of some tolling provisions establishes a legislative intent to prohibit other forms of equitable tolling. See, e.g., Bowen v. City of New York, 476 U.S. 467, 480 (1986) (presence of statutory tolling provision expresses Congress' "clear intent to allow tolling in some cases"); American Pipes and Construction Co. v. Utah, 414 U.S. 538, 541-542 & n.3 (1974); see also, e.g., Mamer v. Apex R.E. & T., 59 F.3d 780 (8th Cir. 1995). In both Bowen and American Pipes, this Court applied equitable tolling to statutes that had their own explicit tolling provisions.

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[12] In support of his assertion that "[t]he precision and detail" of section 2244(d) show "congressional intent to preclude individual equitable considerations," petitioner Calderon cites briefly to United States v. Brockamp, 519 U.S. ___, 117 S.Ct. 849, 850-53, 136 L.Ed.2d 818, 822 (1997). See Pet. 15. Brockamp held that a statutory time limit on filing tax refund claims was a jurisdictional bar. This conclusion was based on the statute's "detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together," as well as on the fact that tax law is not normally characterized by exceptions based on individualized equities and that "occasional unfairness in individual cases" was the "price" that had to be paid "in order to maintain a more workable tax enforcement system." 117 S.Ct. at 852 (emphasis added). The Court of Appeals distinguished Brockamp on several obvious grounds, 1997 WL 709900 *6 n.4, App.3 at A129 n.4, and petitioner fails to address any of them. Nor does Calderon acknowledge that it was the combination of factors "taken together" that caused the presumption in favor of equitable tolling to be overcome in that case.

B. Calderon's Claim That "Congress Revealed Its Intent By Negative Implication."

Petitioner Calderon's second statutory argument is that this Court's decision in Lindh v. Murphy, 521 U.S. ___, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) "announced that Congress has in fact manifested its intent through negative implication for purposes of interpreting the AEDPA." (Pet. 17.) Therefore, the argument runs, since the AEDPA contains another habeas filing limitation -- i.e., a six-month period for filing habeas applications in those capital cases that are litigated under the "opt-in" or "Chapter 154" provisions of the Act, see 28 U.S.C. § 2263 -- and since section 2263 (purportedly) limits tolling to one 30-day extension, the absence of statutory authorization for tolling in section 2244(d) is, by negative implication, indicative of congressional intent that no equitable tolling at all be allowed. (Pet. 16-18.) This argument is meritless.

The threshold problem with the argument is that it reads Lindh far too broadly. Contrary to Calderon's belief, Lindh does not stand for the proposition that every negative inference that could arguably be drawn from the AEDPA is an inference that should be drawn. Lindh did give effect to an obvious negative implication that arose from a reading of one section of the AEDPA (not a limitations statute), but Lindh did so only after considering the textual support for the negative inference, the legislative history, the legal backdrop against which the negative inference arose, and the problems with the competing inferences. 138 L.Ed.2d at 488-94. Only because all these

factors considered together pointed in the direction of the negative inference did Lindh give voice to it.

In the case at bench, the circumstances surrounding the proposed negative inference are very different from those in Lindh. For here, unlike in Lindh, "[e]very relevant signal -- from the Act's plain language, to its legislative history, to its structure -- points in the ... direction" opposite to that of the proposed inference. 1997 WL 109900 *5, App.3 at A132. Here, for example, unlike in Lindh, the negative inference that Calderon seeks to draw would be contrary to the legal backdrop against which section 2244(d) was enacted (e.g., that limitations statutes customarily and presumptively permit equitable tolling). Here, unlike in Lindh, the negative inference would conflict with other provisions of the same Act (e.g., reaffirming the right to counsel in capital cases). Here, unlike in Lindh, the negative implication would also conflict with the legislative history (e.g., the congressional debates, and the rejection of an amendment to make counsel discretionary in capital cases).

Thus, Lindh's recognition that Congress expressed its intent through negative inference in that case has no relevance here. It made sense in Lindh to give effect to a negative inference when, as there, all other indicia of congressional intent point in the same direction. It would be another thing altogether to give effect to a negative inference when, as in the present case, the inference flies in the teeth of the other considerations.

Moreover, the very wording of the statute upon which petitioner relies for his negative inference undermines any such

inference. For, the limitations statute in Chapter 154 (§ 2263) differs significantly from the limitations provision in section 2244(d). Whereas the former states that "[a]ny application under this chapter for habeas corpus relief ... must be filed ... not later than 180 days after final State court affirmance...," the latter provides merely that a "1-year period of limitation shall apply to an application for writ of habeas corpus." Had Congress intended section 2244(d) to serve as the same kind of bar to the filing of a habeas petition as is found in section 2263, it would not have used language that differed so substantially from that used in section 2263.

In sum, then, there is nothing to either of petitioner Calderon's statutory interpretation arguments: Section 2244(d) is a mildly worded, "run-of-the-mill" statute of limitations, and there is no reasonable basis for concluding that Congress expressed its intent to make section 2244(d) a jurisdictional bar via negative inference.[13]

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[13] At several points in his petition, petitioner Calderon alludes to the Report of the Committee on the Judiciary, United States Senate, on S. 1763 (S.Rep. No. 98-226, Sept. 14, 1983) as supporting its interpretation of section 2244(d). (Pet. 7-8, 19.) However, among other problems with Calderon's reliance on the Report are the facts that (1) the Report was issued more than half a generation before the AEDPA was enacted and (2) the statutory language the Report was discussing was significantly changed before it was passed in the AEDPA. (Compare, e.g., proposed § 2244(e)(1) with newly enacted § 2244(d)(1)(A).) To the extent any inference at all can be drawn from the 13-year-old Report, the inference is that Congress rejected the reasoning used therein. See Triestman v. United States, 124 F.3d 361, 374-75 (2nd Cir. 1997) (forerunner bill is not indicative of statutory intent where language relied on was not adopted in enacted statute).

C. Petitioner Calderon's Remaining Arguments Are Meritless, Irrelevant And Inaccurate.

The remaining arguments offered by petitioner Calderon appear to be a thinly veiled effort to induce the Court to make the AEDPA conform to what Calderon thinks the law "should be" (Pet. 8). Calderon's arguments are quite alien to accepted principles of statutory interpretation and largely substitute hyperbole and aspersion for reason, precedent, and law. (Pet. 7-14.) Because most of the arguments are obviously irrelevant, real party Beeler will not answer them in detail. Three responses are called for, nevertheless:

First: petitioner Calderon asserts that allowing section 2244(d)'s one-year period to be equitably tolled will produce "indefinite delay," "eviscerate[]" the function of the statute of limitations, and "open[] the door" to "unpredictable, uneven, and inevitably arbitrary treatment, even within a single case." (Pet. 8-9.) This is unjustified rhetoric, for the reasons pointed out in the Court of Appeals's opinion. 1997 WL 709900 at *5, App.3 at A130-A131. In addition, equitable tolling has been a "traditional" principle applicable to federal statutes for well over one hundred years. See, e.g., Bowen v. City of New York, supra, 476 U.S. at 479; Honda v. Clark, supra, 386 U.S. at 501; Braun v. Sauerwien, supra, 10 Wall. at 223. Yet, as far as real party can determine (and petitioner Calderon has not cited anything to the contrary), equitable tolling has never been found to have "eviscerate[d]" a statute of limitations or produced "indefinite delay."

It bears noting that no habeas corpus statute of limitations existed before the enactment of section 2244(d). Thus, none of the supposed "endless delays" prior to the AEDPA (Pet. 7) could have been attributed to equitable tolling. Consequently, congressional concern with delay would not have translated into a desire to wipe out equitable tolling.

Second: underlying petitioner Calderon's contention about "indefinite delay" is a belief that federal district court judges cannot be trusted to exercise their equitable tolling authority properly. There is no evidence that Congress shared Calderon's disrespect for the federal judiciary, but this does not deter Calderon. Instead, after conceding that the Ninth Circuit has set a "high standard" for habeas petitioners to meet in order to obtain equitable tolling, Calderon attempts to prove that this Court should distrust the lower courts because "in actual practice no standard exists." (Pet. 11.) According to Calderon, "the district courts have equitably tolled the filing period in numerous cases," referring to eleven cases in California district courts in which equitable tolling has apparently been granted. (Pet. 10 & n.3.) But Calderon fails to mention that in approximately 45-50 pending post-AEDPA federal habeas cases in this State (by real party's count), equitably tolling has either not been sought or not been granted.[14]

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[14] Petitioner's claim that there are "numerous cases" in which tolling has been granted is misleading in another way, too. The AEDPA is a new law, and there has been much uncertainty about many important matters connected with the Act, including (1) whether the AEDPA applies to those pending cases in which

(continued...)

Calderon then purports to discuss three of the eleven cited tolling cases in more detail. In the discussion, however, Calderon omits to mention many inconvenient facts, such as (1) that federal habeas petitions were filed in each of the three cases shortly (18 days to five months) after April 24, 1997, (2) that in two cases, tolling was necessitated because of the failure of state and federal judges to act promptly on essential matters before them, and (3) that in at least one case Calderon himself stipulated to tolling for a portion of the period involved.

None of these facts bespeak of "indefinite delay" or of any refusal by the district courts to adhere to the standard set forth by the Ninth Circuit in the present case. To the contrary, the facts show that equitable tolling can be an unavoidable necessity, that it is reserved for a small minority of cases, and that habeas petitions are being filed at a much quicker pace than before the AEDPA was enacted.

Third: having accused federal judges of being untrustworthy, petitioner Calderon next proceeds to cast aspersions on counsel

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[14](...continued)
only "McFarland" applications for counsel had been filed prior to April 24, 1996, and (2) what is the implication of the AEDPA in general, and its one-year statute of limitations in particular, for unexhausted claims and for the "no mixed petition" doctrine of Rose v. Lundy, 455 U.S. 509 (1982). Uncertainty in the law has long been recognized as a basis for equitable tolling, and the uncertainty with respect to the AEDPA underlies the equitable tolling grants in many of the cases listed by petitioner Calderon (including all of the cases in which tolling was granted only as to unexhausted claims). Plainly, as clarity emerges as to the meaning of the AEDPA, the use of equitable tolling will drop significantly from the already low level that exists at the start-up of the AEDPA.

for real party Beeler. According to Calderon, (1) counsel have "shown a general disregard for any limitation for filing [Mr. Beeler's] habeas claims" and are "seeking to further extend the time" so as to produce "unlimited delay," and (2) equitable tolling was not justified in real party's case "under the strict standard established by the Ninth Circuit.' (Pet. 12-13.) On their face, these assertions would hardly warrant a grant of certiorari even if they were accurate, see Supreme Court Rule 10, and in fact neither is.

Calderon's second assertion (that tolling is not justified) is so frivolous that it was never offered to the Ninth Circuit. There, Calderon argued only that the AEDPA "is not amenable to equitable tolling" and that therefore the district court "exceeded its jurisdiction" in allowing tolling. (Pet. for Writ of Mandate at 3; see also id. at 4, 8 (caption), 10-11, 12, 14.) Calderon made no claim that the court abused its discretion under a proper application of equitable tolling principles.

As for the Calderon's first claim (that real party's counsel are seeking to inject indefinite delay into the proceedings), the assertion is equally frivolous. It is based entirely upon the fact that real party has tried to have all claims litigated in his first habeas proceedings, an effort that would seem to be warranted by both case law and the AEDPA. McCleskey v. Zant, 499 U.S. 467 (1991); AEDPA § 106(b), amending 28 U.S.C. § 2244(b). Calderon's assertion that these efforts are designed to engender "unlimited delay" makes no sense. The only way that awaiting the outcome of state exhaustion proceedings could inject "unlimited

delay" into the federal habeas proceedings would be if the state court itself "delays indefinitely" in handling real party's exhaustion petition. Thus, Calderon's current argument is actually a claim that yet another court -- now, the California Supreme Court -- cannot be trusted to do its job properly. Calderon offers no support for its belief that the state court will be so derelict in its duty.[15]

In sum: petitioner Calderon has sought to take a clear, simple and direct matter of statutory construction and transform it into an aspersion-casting battle over what the appropriate time-limitations policy "should be." That effort is inappropriate as a matter of statutory construction, and it is based on an inaccurate presentation of the facts.

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[15] Calderon also fails to explain why delays by the state court should be attributed to real party; petitioner Calderon has at least as much ability to control the pace of proceedings there as does Mr. Beeler (which is nil).

What makes Calderon's assertion of bad faith on real party's part even more egregious is that at the same time as real party filed his federal habeas petition containing exhausted claims, he sought to "expedite these proceedings" by having the unexhausted claims amended into the petition. Even though the AEDPA does not require exhaustion when there is an "absence of available State corrective process" (AEDPA § 104(1), amending 28 U.S.C. § 2254(b)(1)(B)(i)), and notwithstanding that Calderon expressly disclaimed that "there is necessarily a remedy available to [Mr. Beeler] in the state courts" for the unexhausted claims, Calderon refused to waive exhaustion and (successfully) opposed real party's efforts to amend and expedite. It is thus disingenuous for Calderon here to assert that real party's counsel are attempting to inject "indefinite delay" into the case.

IV. ADDITIONAL CONSIDERATIONS MILITATE AGAINST GRANTING CERTIORARI IN THE PRESENT CASE.

In addition to the complete lack of merit to petitioner Calderon's position, certiorari is also inappropriate in this case for two additional reasons.

First, the certiorari petition should be denied as an abusive, successive filing. Petitioner Calderon has previously sought to persuade this Court to review the very same issue as it now presents and in this exact same case. This occurred in April 1997, when Calderon sought review of the Court of Appeals' opinion immediately upon issuance, by means of a petition for writ of mandate. That petition was denied. See In re Arthur Calderon, 138 L.Ed.2d 1004 (1997). Having had one such full opportunity, petitioner Calderon should not be given another. To permit him a second bite at the apple would open the door to every dissatisfied lower-court litigant employing exactly these same tactics in the future. There is nothing in the law or in common sense that warrants such duplicative, wasteful filings.

Second, this case is inappropriate for certiorari review for an additional reason. Prior to the April 23, 1997 date on which (in petitioner Calderon's view) section 2244(d)'s one-year limitation period expired, real party Beeler had specifically been authorized by both the District Court and the Court of Appeals to file his habeas petition at a later date, and this Court declined to review those decisions both before and after that date. Real party justifiably relied upon those court rulings in filing after the April 23, 1997 date. To hold at this

late date that a petition should have been filed by April 23 would be unfair and would also amount to an impermissibly retroactive application of section 2244(d). See, e.g., Landgraf v. U.S.I. Film Prod., 511 U.S. 244 (1994).

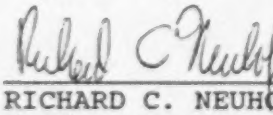
V. CONCLUSION.

The Court of Appeals has merely held that section 2244(d) embodies the traditional principle of equitable tolling which is presumptively embodied, and has traditionally been embodied, in statutes of limitation, and which is in accord with "the Act's plain language, ... its legislative history, [and] its structure." 1997 WL 709900 at *5, App.3 at 132. The Court's conclusion is straightforward, simple, and unimpeachable.

Petitioner Calderon's petition to this Court ignores virtually everything the Court of Appeals wrote and proffers nothing substantial in its place. The petition should be denied.

Dated: December 19, 1997

Respectfully submitted,

By: 

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